

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE TERRILL MOORE,

Defendant-Appellant.

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UNPUBLISHED  
February 22, 2007

No. 265069  
Cass Circuit Court  
LC No. 05-010083-FH

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced him, as an habitual offender, second offense, MCL 769.10, to 5 to 30 years' imprisonment for the possession with intent to deliver cocaine conviction, and 42 days in jail for the possession of marijuana conviction. We affirm.

On February 17, 2005, police officers stopped a vehicle in which defendant was a passenger, and his uncle, Michael Moore, was the driver. Officers arrested defendant after discovering cocaine and marijuana in the vehicle. Defendant was subsequently charged with possession of marijuana, possession of cocaine with intent to deliver, and conspiracy to do the same.

In February 2005, Detective Sergeant David Toxopeus worked on a narcotics investigation involving defendant's cousin, Henry Moore. A confidential informant, arranged to purchase cocaine from Henry under Toxopeus' surveillance. The informant and Henry planned to meet in front of Henry and defendant's grandmother's house. On February 17, 2005, the informant parked in front of the house as planned, and Henry approached his vehicle, sold him the cocaine, and abruptly returned to the house. During the transaction, Toxopeus observed two black males, later identified as defendant and Michael, leave the house, enter a second vehicle, and drive away.

An undercover detective observed the drug transaction between the informant and Henry. She mistakenly believed that Henry was one of the two black males who entered the second vehicle and drove away. Intending to arrest Henry, several officers followed the vehicle and conducted a traffic stop. Two deputies testified that they observed defendant push something

between the vehicle's front seats. Upon searching the vehicle, officers found large amounts of crack cocaine and powder cocaine between the seats, as well as plastic baggies, a digital scale, a ledger book, and a razor blade. They also recovered marijuana and over \$2,000 in cash from defendant's person. At trial, defendant admitted to possessing the marijuana for his own use and denied having any knowledge of the cocaine.

On appeal, defendant argues that the evidence regarding the drug transaction between the informant and Henry was irrelevant and unfairly prejudicial. We review unpreserved evidentiary claims for plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings, independent of his innocence." *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that the challenged evidence constituted impermissible bad-acts evidence because it implied that he participated in drug trafficking before his arrest. Pursuant to MRE 404(b), evidence of an individual's crimes, wrongs, or bad acts is inadmissible to show a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Regardless whether the evidence was admissible under MRE 404(b), we find that the challenged evidence was properly admitted as part of the res gestae of the charged offenses. Normally, the facts and circumstances surrounding the commission of a crime are admissible as part of the res gestae, the complete story of the offense, *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981); *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979), even when these antecedent events include other criminal acts, *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The challenged evidence provided the jury with the full context in which the disputed event occurred. In particular, it explained why police officers stopped defendant and Michael. See *People v Scholl*, 453 Mich 730, 741-743; 556 NW2d 851 (1996).

Additionally, the challenged evidence was relevant. To be relevant, evidence must be material to a fact of consequence to the action. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Here, the prosecutor argued that the challenged evidence was relevant to establishing that defendant and Michael conspired with Henry to distribute drugs. We agree that the evidence was relevant for that reason. The informant testified that defendant and Michael spoke to Henry as Henry approached the informant's car and several witnesses indicated that defendant, Michael, and Henry left the scene immediately after spotting a nearby police vehicle.

Further, we disagree with defendant that the challenged evidence was unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. Although it was relevant to establishing a conspiracy, we note that the jury acquitted defendant of all conspiracy charges. Thus, there is no evidence that the jury gave preemptive weight to the challenged evidence. The trial court did not err in admitting the evidence at issue.

Alternatively, defendant argues that his trial counsel was ineffective for failing to object to the challenged evidence. Whether defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Ordinarily, the trial court's factual findings are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.* at 484-485. Because the trial court was

not presented with and did not rule on defendant's claim, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Considering that the challenged evidence was properly admitted, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). And, in light of the evidence of defendant's guilt, defendant cannot establish that an objection by defense counsel would have changed the outcome of the case. *Id.*

Defendant next argues on appeal that the trial court erroneously instructed the jury that it could decide whether defendant's knowledge of the presence of drugs constituted possession. Jury instructions involving questions of law are reviewed de novo on appeal. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The reviewing court "'examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried.'" *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006), quoting *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

During deliberations, the jury asked the trial court two questions. First, it asked for a definition of the word "possession." The trial judge responded to the question by reading the standard jury instruction defining possession. Secondly, the jury asked, "[j]ust because someone knew drugs are near does it mean that he has possession?" In response, the trial judge said, "That is a question for you to decide. . . . You'll have to make that determination from the facts and circumstances in evidence in this case."

We agree that the trial court erred by instructing the jury that it could decide whether mere knowledge of the presence of nearby drugs constitutes possession. A trial court may give additional instructions not covered in the standard jury instructions as long as they accurately state the law and are applicable and understandable. *People v Lynn*, 229 Mich App 116, 121; 580 NW2d 472 (1998), rev'd on other grounds 459 Mich 53 (1998). Here, the challenged instruction contradicted the standard instruction initially given by the trial court. The standard instruction clearly indicated that possession required more than *merely knowing* about the presence of drugs. Furthermore, it is well established that proof of drug possession requires a showing of dominion or the right of control over drugs, *and* knowledge of their presence and character. *People v Meshell*, 265 Mich App 616, 621; 696 NW2d 754 (2005). The challenged instruction improperly implied that it may be unnecessary to establish dominion or right of control if the jury determined that mere knowledge is enough for a finding of possession.

Nevertheless, we conclude that the trial court did not commit error warranting reversal. Preserved instructional error will not result in reversal "unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The defendant bears the burden of establishing error that warrants reversal. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998). Although the challenged instruction was potentially misleading, the standard instruction given by the trial court clearly states that possession requires actual control or the right of control. Furthermore, evidence that defendant pushed the cocaine between the seats of the vehicle, in an attempt to hide it from the police officers, was sufficient to establish

beyond a reasonable doubt that defendant knew about the cocaine and exercised dominion over it. *People v Williams*, 268 Mich App 416, 422; 707 NW2d 624 (2005). Therefore, reversal is not warranted.

Finally, defendant argues on appeal that the prosecutor materially mischaracterized evidence during her closing argument. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *Ackerman, supra* at 448. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *Ackerman, supra* at 450, but she is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues that the prosecutor mischaracterized evidence, or argued facts not in evidence, by stating that defendant spoke to Henry during his drug transaction with the informant. During her closing argument, the prosecutor stated in relevant part:

You heard the testimony of Kevin Pompey that [defendant] had a conversation that he observed at the house with Henry Moore right during a drug deal transaction . . . and after they had contact you heard the testimony of Mr. Pompey that Mr. [Henry] Moore came to the vehicle and sold this cocaine to the undercover . . . . Even [defendant] here says they were at that location. There was a conversation he had with Mr. Henry Moore.

Defendant asserts that the prosecutor's references to the informant and defendant's testimonies were materially false. We find no merit to defendant's assertion as it relates to the informant's testimony. On direct examination, he indicated that he observed defendant talking to Henry immediately before the drug transaction. While, during cross-examination, the informant denied seeing any contact between defendant and Henry, this discrepancy does not render the prosecutor's argument improper. It is apparent that the prosecutor recited the portion of the informant's testimony supporting her theory of the case. On the other hand, we agree that the prosecutor committed misconduct by stating that defendant admitted to having a conversation with Henry, which was unsupported by the facts in evidence. *Ackerman, supra* at 450.

Regardless, we find no merit to the argument that the prosecutor's misconduct was outcome determinative. *Carines, supra* at 763. A prosecutor's isolated statement, even when improper, is subject to harmless error analysis. See *People v Armentero*, 148 Mich App 120, 134; 384 NW2d 98 (1986). The prosecutor made the challenged remarks in reference to defendant's conspiracy to distribute drugs, but the jury acquitted him of all conspiracy charges. And, there was more than sufficient evidence presented at trial to convict defendant of possessing cocaine with intent to deliver. Furthermore, the trial court offered a limiting instruction to the jury, alleviating any prejudice to defendant. *Ackerman, supra* at 449. Reversal is not warranted.

Alternatively, defendant argues that his trial counsel's failure to object to the prosecutor's argument amounted to ineffective assistance of counsel. Considering that the prosecutor's reference to the informant's testimony was proper, any objection to that portion of her argument would have been futile. *Thomas, supra*. And, in light of the evidence of defendant's guilt, and the trial court's limiting instruction, defendant cannot establish that an objection to the remainder of the prosecutor's argument would have changed the outcome of the case. *Id.* Therefore, defendant has failed to demonstrate that he was deprived of the effective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray